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91-753

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOHN M. ABICK, JAMES R. BRADLEY, JOHN B. CARRUTHERS, GERALD CLANCY, ISADORE COLES, RUTH COTTON, LUCIUS C. DANIEL, JR., CHARLES W. DAVID, RAYMOND C. DeRYCK, BRUCE GOLDSMITH, RICHARD A. HENTSCHEL, CALVIN C. HOPKINS, LLOYD JACKSON, RAYMOND KAY, JOHN J. KIRITSIS, EDWARD B. LEWAND, PHILIP MULLEN, STEVE RADULOVICH, ELMER RASKIN, CLAY REEVES, FRANCIS D. RYAN, GEORGE L. VAN ANTWERP, JR., BERNARD VESSELS, RICHARD VIECELLI, JULIUS WATSON, EDWARD WOJTOWICZ, CHARLIE CURRIE, ROBERT ESTON, THORNTON JACKSON, JAMES KINNARD, ALFONSO NEWKIRK, ROBERT PERRY, THEODIS POOLE, ROBERT RUHL, WILLIAM SHUFORD, RAYMOND SIKORA, ERNEST SOLOMON AND JERAMIA WEATHERLY,

Petitioners,

v.

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

- AND APPENDIX -

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(6)

QUESTIONS PRESENTED

I.

WHETHER A STATE COURT MAY INVOKE COLLATERAL ESTOPPEL AGAINST A PLAINTIFF IN RELIANCE ON A JUDGMENT OF A UNITED STATES DISTRICT COURT WHERE THAT COURT FOUND NO JURISDICTION, AND MERELY GRATUITOUSLY DISCUSSED THE MERITS OF THE PLAINTIFF'S CASE, AND THE UNITED STATES COURT OF APPEALS AFFIRMED ON THE BASIS OF LACK OF JURISDICTION, DECLINING TO REACH THE ISSUE ON THE MERITS?

II.

WHETHER THE STATE THROUGH ITS SUPREME COURT MAY, WITHOUT COMPENSATION, TAKE PROPERTY EXPLICITLY GRANTED TO THE PETITIONERS BY THE STATE LEGISLATURE, IN VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT?

III.

WHETHER THERE HAS BEEN A VIOLATION OF THE CONTRACT CLAUSE OF THE CONSTITUTION WHERE THE STATE, THROUGH ITS SUPREME COURT HAS INTERFERED WITH AND DEPRIVED THE PETITIONERS OF THEIR CONTRACTUAL RIGHT, CREATED BY GRANT OF THE STATE LEGISLATURE, TO LIFE TENURE IN THE EXCLUSIVE SERVICE OF PROCESS IN THE COURT IN WHICH THEY SERVE?

LIST OF PARTIES

The caption of the case contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

OPINIONS BELOW

The United States District Court for the Eastern District of Michigan: Opinion reported at 607 F. Supp 687 (E.D. Mich. 1985). (App. A-16)

The Sixth Circuit Court of Appeals: Opinion reported at 803 F.2d 874 (6th Cir. 1986). (App. A-10)

The Michigan Court of Claims: No opinion was published. (App. A-7)

The Michigan Court of Appeals: No opinion was published. (App. A-3)

The Michigan Supreme Court: Leave to Appeal denied (App. A-2); Motion for Reconsideration denied. (App. A-1) No opinions were published.

JURISDICTION

The judgment of the Michigan Court of Appeals (App. A-3) was entered on June 8, 1990. The order of the Michigan Supreme Court denying leave was entered March 29, 1991. (App. A-2) The Motion for Reconsideration was denied July 16, 1991. (App. A-1) Justice Stevens extended the time for filing a Petition for Writ of Certiorari to and including October 29, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "[N]or shall private property be taken for public use, without just compensation."

Article I, Section 10, clause 1 of the United States Constitution provides in pertinent part:

> "No State shall . . . pass any . . . law impairing the Obligations of Contracts."

The Fourteenth Amendment of the United States Constitution states in pertinent part:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Michigan Compiled Laws 600.8321, 600.8322 and 213.51(h) are reproduced in pertinent part in the appendix to this Petition. (App. A-33–A-36)

Michigan Court Rule 2.103 reads in pertinent part:

> "(A) Service Generally. Process in civil actions may be served by any legally competent adult who is not a party or an officer of a corporate party."

RAISING THE FEDERAL QUESTION

Petitioners' complaint alleged the Constitutional issues of a taking without compensation under the Fifth and Fourteenth Amendments, and interference with contractual rights, and was initiated in the United States District Court for the Eastern District of Michigan. Due to dismissal under the Eleventh Amendment, the complaint was refiled in the appropriate State Court with the same United States Constitutional violations pleaded. The Constitutional violations were thus raised at the earliest possible time and were reiterated at all appellate levels.

STATEMENT OF THE CASE

Petitioners, Bailiffs of the 36th District Court, can trace their origins back to at least as early as 1929, when Constables were the exclusive servers of process in the Common Pleas Court of Detroit.

In 1941, the Michigan Legislature transformed the Constables into Bailiffs of the Common Pleas Court,

continuing their property right in a life-tenured position and as exclusive servers of all process issued out of the Court.

In 1968, the Legislature created a state-wide system of District Courts. MCL 600.8101 et seq. In 1981, the Legislature abolished the Common Pleas Court for the City of Detroit and created the 36th District Court. In so doing, the Michigan Legislature reaffirmed the property right of Common Pleas Court Bailiffs by "grandfathering" them into the same position with the same duties and entitlements. The Legislature gave every Bailiff a $20,000.00 salary to partially compensate for the "taking" due to the state reorganization of the Courts. This amount was directly related to the reduced territory available to the Bailiffs for service of process after the reorganization, which would reduce their income. They were rightfully compensated for this taking.

The 1981 District Court reorganization effected by MCL 600.8322(1) provides in pertinent part:

> "[A]ll process issued by the district court in civil actions shall be rotated among the Bailiffs. . . . A Bailiff shall hold office until death, retirement, resignation, or removal from office for misfeasance or malfeasance."

This language continues, virtually unchanged, statutory language concerning the Petitioners' position since 1941.

Anticipating natural attrition, the Legislature provided in MCL 600.8322(4), (5), that Bailiff vacancies would not be filled. Thus uniformity with Michigan's 97 other District Courts would be achieved by a process of death, retirement and resignation.

On March 1, 1985, the Michigan Supreme Court elected to accelerate the legislative provisions for state-wide court uniformity and enacted a Court Rule, MCR

2.103 which provides that "[p]rocess in civil actions may be served by any legally competent adult who is not a party or an officer of a corporate party."

Of Michigan's 98 District Courts, only the 36th District Court, as successor to the Common Pleas Court, had Bailiffs with life-tenured positions and exclusivity of service. The other 97 District Courts were governed by MCL 600.8321, enacted in 1968. The Legislature enacted MCL 600.8322 in 1981, specifically to address the matter of the Common Pleas Court Bailiffs who were to become the 36th District Court Bailiffs, their life-tenured position and their guarantee of exclusive service of all process.

The Michigan Supreme Court purported to apply the Court Rule to the 36th District Court, despite clear statutory provisions providing for service of process by Bailiffs only.

The implementation of MCR 2.103 accomplished precisely what Petitioners feared: income reduction so severe and substantial that it has amounted to a taking without compensation.

In opposing the Supreme Court's application of its Court Rule to the 36th District Court, the Legislature reiterated its grant of a property right to the Petitioners by adopting House Resolution 371. (App. A-30).

Petitioners feared pursuing their claim in the State courts knowing that the Supreme Court had refused requests by the Chief Judge of the 36th District Court (App. A-31), the Chair of the House Judiciary Committee (App. A-28), and the Resolution of the House of Representatives (App. A-30) to resolve the conflict. Their attempt to pursue a federal remedy was unavailable, chiefly on Eleventh Amendment procedural grounds.

Despite Petitioners' fear of the political power struggle between the branches of state government

interfering with their ability to receive a fair hearing, they pursued the procedurally correct state court process by filing their Constitutional claims in the Michigan Court of Claims. The Respondents filed for Summary Disposition on grounds of collateral estoppel and failure to state a claim. Without receiving any evidence or holding a hearing on the merits, the Court of Claims dismissed the case citing collateral estoppel based upon the opinions of the United States District Court and Sixth Circuit. It further found no property right, citing, as did the opinion of the United States District Court upon which it entirely relied, the wrong statute, i.e., MCL 600.8321, not, as Petitioners argued, 600.8322.

The Michigan Court of Appeals continued the egregious misapplication of federal law and found that Petitioners were collaterally estopped from bringing their Constitutional claims in State court due to the dismissal in the United States District Court for lack of jurisdiction and that Court's gratuitous comments on the merits. The Michigan Supreme Court twice refused to grant leave to appeal.

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REASONS FOR GRANTING THE PETITION

The actions of the Michigan courts, in particular the Michigan Court of Appeals, raise substantial federal procedural and substantive questions, constitute a significant abuse of federal law, wholly thwart the vindication of property rights guaranteed under the United States Constitution, and result in a gross miscarriage of justice, all of which can be resolved only by this Court.

I.

COLLATERAL ESTOPPEL

1. The United States District Court dismissed Petitioners' case for lack of federal jurisdiction, but purported to "discuss" the merits of their claim after having found no jurisdiction.

2. The Sixth Circuit affirmed on lack of federal jurisdiction, and for that reason declined to review the merits.

3. The Michigan Court of Claims relied on the U.S. District Court's decision and found the Petitioners' collaterally estopped. The Court of Claims also was "persuaded" by the discussion on the merits of the United States District Court.

4. The Michigan Court of Appeals affirmed the Court of Claims solely on the basis of collateral estoppel and for that reason declined to review the merits of Petitioners' claims.

5. The Michigan Supreme Court twice denied leave to appeal.

Without this Court's intervention, Petitioners will have been denied the opportunity to fully litigate their claims, based on the patently absurd conclusion

of the Michigan Courts that the absence of federal jurisdiction, decided by two federal courts, provides the basis for collateral estoppel on the merits, under federal law.

Where federal rulings are employed as the basis for collateral estoppel, federal law as to estoppel is to be applied. "The Supreme Court has consistently adhered to the proposition that it has jurisdiction to review state decisions that deal with res judicata effects of federal judgments. At least to this extent, it is clear that it believes that a federal question is involved." Wright, Miller and Cooper, *Federal Practice and Procedure*, Vol. 18, § 4468, (West, 1981) p. 651. *See, Stoll* v. *Gottlieb*, 305 U.S. 165 (1938). Further, it is a matter of basic procedural law that once jurisdiction is found lacking, no decision on the merits may be rendered. *American Guar. Corp.* v. *U.S.*, 401 F2d 1004, 1005-1006, 185 Ct.Cl 502, (1968).

In this case, initially filed in the United States District Court for the Eastern District of Michigan, the Petitioners pressed a claim, as they do now, of a property right which was unconstitutionally taken from them by the State of Michigan. The District Court, and the Sixth Circuit on appeal, each concluded that the Petitioners were jurisdictionally barred from bringing their suit in federal court. As a consequence, the Petitioners then brought their action in the Michigan Court of Claims. That Court, and the Michigan Court of Appeals, found the Petitioners' action in State courts barred by the doctrine of collateral estoppel.

In support of its conclusion, the Court of Appeals relied almost exclusively upon the opinion of Judge Feikens in the parties' earlier federal litigation, *Abick* v. *State of Michigan*, 607 F. Supp. 687 (E.D. Mich. 1985). In its opinion, after summarizing the nature of the Peti-

tioners' argument, the Michigan Court of Appeals turned to a discussion of Judge Feikens' decision in the District Court, which had concluded that by force of the Eleventh Amendment, the District Court was completely without jurisdiction over the subject matter and the parties defendant in the case before it. It was therefore constitutionally incapable of taking any further action with respect to those parties.

In relying on the District Court to reach the conclusion that the Petitioners were collaterally estopped from bringing their action in the Court of Claims, the Michigan Court of Appeals paid scant attention to the decision of the Sixth Circuit in *Abick*, *Abick* v. *State of Michigan*, 803 F.2d 874 (6th Cir. 1986). The entire reference to that Court's holding is as follows:

> "The 6th Circuit Court of Appeals affirmed. (Citation omitted.) The court agreed that all defendants were immune from suit and did not reach the issue of the existence of a property interest."

The Sixth Circuit disposed of the matter on jurisdictional grounds only, and did not review the lower court's comments with respect to the property interest. The Michigan Court of Appeals apparently found that fact to be of no legal significance. To the contrary, however, it is dispositive of the issue before this Court, and this Court is now the only forum for rectifying this egregious misapplication of federal law.

"Issue preclusion attaches only to determinations that were necessary to support the judgment entered in the first action." Wright, Miller and Cooper, *Federal Practice and Procedure*, Vol. 18, § 4421, (West, 1981) p. 192. It is clear that the decision of the Michigan Court of Appeals, finding the Petitioners to be collaterally estopped from pressing their claim of a constitutionally

protected property interest, is incorrect as a matter of law and must be reversed. *See, Hannahville Indian Community* v. *U.S.*, 180 Ct.Cl 477, 485 (1967); *International Refugee Organization* v. *Republic S.S. Corp.*, 189 F.2d 858, 862. (4th Cir. 1951). Moreover, Petitioners have pursued the course of action required by this Court to challenge this misapplication of federal law. "Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court." *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518, 525 (1986). And, while there is nothing in law or logic to suggest that Michigan law with respect to collateral estoppel would differ in any manner from that obtaining in the federal courts, *See, Falk* v. *State Bar of Michigan*, 631 F. Supp. 1515 (1986), as noted above, it is federal law that governs this issue.

Even without regard to the dispositive fact that the Sixth Circuit ruled only on the question of jurisdiction, the general rule that issue preclusion attaches only to determinations that were necessary to support the judgment entered in the first action dictates a reversal of the Court of Appeals. Once the determination of lack of jurisdiction had been made, there was no legal authority for further action on the part of the federal trial judge. Unhappily, he nonetheless reached out to discuss and perhaps decide the merits (it is unclear from his opinion which he did), although the case was no longer in the posture for him to decide on the merits. Even if the District Court's opinion is read as purporting to reach the merits of Petitioners' arguments, once jurisdiction had been found lacking any such decision would be of no effect. And of course, the Sixth Circuit declined to reach the merits of Petitioners' claims because of lack of jurisdiction, thus doubly ren-

dering any collateral estoppel application by the Michigan courts completely spurious.

This Court acts as the superintendent of federal law and its application. Were this Court to decline to review and reverse actions such as that of the Michigan Court of Appeals, any litigant who had made a jurisdictional error in the federal courts, and sought to preserve a cause of action by removing to the proper state court, would face the possibility of being forever barred by a misapplication of federal collateral estoppel rules. This danger becomes even more pointed where, as here, the defendant is the State itself, and federal jurisdiction is found lacking by virtue of the Eleventh Amendment. Without the protection of the Supreme Court, litigants with claims against the State are at the mercy of State courts' ability to destroy all claims against the State, without ever deigning to hear the merits of the claim, on the spurious grounds of collateral estoppel. Indeed, throughout the entire course of Petitioners' litigation, their claims have never received a fully litigated hearing on the merits.

II.

THE TAKINGS CLAUSE

The Takings Clause issue raised in this Petition embraces the quintessence of takings claims — the government made a promise, here in the form of life-tenured exclusivity of service of process in a court system, and then reneged on that promise by opening up service of process to "any legally competent adult. . . ." With the exception of a stipend designed to compensate for loss of territory when the jurisdictional limits of the new court were created, the Petitioners' income depended wholly on the amount of process issued out of the court. With the loss of the promised

exclusivity, central to the property possessed by the Petitioners, and central to their income expectation, the taking by the government was essentially of the entirety of the Petitioners' property.

As indicated above, the Petitioners have been granted a vested property right in the exclusive service of process in the 36th District Court of Michigan. By court rule, the Michigan Supreme Court purported to divest Petitioners of their property, in violation, Petitioners contend, of their rights under the Fifth and Fourteenth Amendments to the United States Constitution. That portion of the Fifth Amendment relating to the taking of property without just compensation has been made applicable against the States through the Fourteenth Amendment, *Chicago, B.&Q. R. Co.* v. *Chicago*, 166 U.S. 226, 239 (1897); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 122 (1978), and is self-executing. *United States* v. *Clarke*, 445 U.S. 253, 257 (1980).

Takings jurisprudence, as developed in this Court, is clear that formal eminent domain is unnecessary to the finding of a taking. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Nor need the property in question be realty or indeed tangible property. *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). The Court has employed a variety of approaches in amplifying what "property" is. One approach, particularly apposite to this Petition, has been characterized as viewing property for takings purposes as "economically valuable rights created by positive law." Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 California L. Rev. 1299, 1310 (1989).

There can be no question here that the source of the property claimed by Petitioners is in the positive law, a duly enacted statute of the State of Michigan. Moreover, there can be no question as to legislative intent, given the explicit reiteration of the grant of the property right by the Legislature in Resolution 371. (App. A-29)

This Court has also employed a definition of property in terms of economically valuable rights created by positive law in takings cases that do not involve the formal exercise of eminent domain, and do involve intangible interests. *See, Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980) where the Court, relying on *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) wrote: "We, of course, also accept the . . . proposition that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" *citing Roth, supra*, at 577. In another significant case involving intangible property (trade secrets), *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), this Court likewise relied on *Roth's* definition of property, referring to its formulation as to property as a "basic axiom." at 1001.

With respect to ascertaining whether a taking has occurred, this Court has established a three part test. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 122 (1978). It is clear that this test is applicable to claims of taking of intangible property. Thus, the Court applied that test in *Monsanto, supra*, finding a taking with respect to an explicit government promise regarding confidentiality in trade secrets, and in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987) where a property interest in continued benefits under AFDC was not found because the rights had not vested in the claimant. The *Bowen* court found that the government, as was found in two of three time periods involved in *Monsanto*, had clearly reserved the right to change the law. Of course, no such reservation is present here. As to intangible property under Michigan law, MCL 213.51 *et seq.*, the Uniform Condemnation Procedures Act, extant at the time of the grant to the Petitioners, includes tangible

and intangible property and property rights, whether real or personal. (App. A-36).

The *Penn Central* test looks to the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. With respect to the first prong of that test, there can be no question that the government has removed from the Petitioners the totality of their position in all meaningful ways. This is inextricably tied up with the second part of the test; the Petitioners have lost their livelihood. They engaged in fee for service activity and their services were exclusive. The Michigan Supreme Court has removed that exclusivity. Petitioners retain their title, but as a practical matter it is nothing more, in economic terms, than an empty shell.

As in *Monsanto*, it is the third prong of the test that will likely prove dispositive in this matter. In *Monsanto* this Court said that a reasonable investment-backed expectation must be more than a "unilateral expectation or an abstract need." 467 U.S. at 1005. The Monsanto Company had been aware of limitations on trade secret confidentiality placed upon it by the government with respect to certain time periods. But data in one time period had been submitted under "explicit assurance" of confidentiality. "This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." 467 U.S. at 1011. As was the case in *Monsanto*, the Petitioners received and enjoyed their property under explicit assurance from the government. MCL 600.8322 provides that the Petitioners will hold their positions for life, and that the position encompasses the exclusive service of "all process issued by" the 36th District Court. "The right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

Id. The Petitioners had the exclusive right to service of process; the Michigan Supreme Court took away the exclusivity that made their property right meaningful and valuable.

Petitioners cannot be made to be the victims, intended or otherwise, of an inter-branch struggle between two branches of government. The State has argued that the Michigan Supreme Court has the constitutional authority under the Michigan Constitution to prescribe rules for practice and procedure. Undoubtedly, the Michigan Supreme Court, were this issue to be brought back to it, would hold to its previous position that its actions were constitutional, and therefore not a taking. Again, Petitioners urge, this strongly argues for this Court to undertake to resolve, at this stage, the substantive issues raised by them. Moreover, while Petitioners agree with the State Legislature that the Court's authority under the Constitution does not extend so far as to prescribe *who* shall serve as opposed to *how* service shall be made, the answer to that question *either way* is in no way dispositive of the Petitioners' claims. The grant of property to the Petitioners from the State Legislature was an explicit assurance, a clear promise by the State that Petitioners had a life tenure in the exclusive service of process in the 36th District Court. The State has reneged on that promise. And it cannot matter that the moving agent in the taking of Petitioners' property is the State Supreme Court.

> "Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make a law, or to regulate, or to pursue a public project, preexisting property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Consti-

> tution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. * * * Because the Due Process Clause forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."

Hughes v. *Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

III.

THE CONTRACT CLAUSE

The Contract Clause issue tracks closely that of the Takings Clause. Again, government has granted to the Petitioners a life tenure in the exclusive service of process in the 36th District Court. The government reneged on that promise. In the grant, the Legislature obligated the state to issue all service of process in the court through the Petitioners, the method by which the Petitioners earned their livelihood. The State, through its Supreme Court, revoked that obligation, opening up service of process to all. By destroying exclusivity, the key economic component of the original grant, the State has caused substantial economic damage to Petitioners.

In *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) this Court stated that the normal deference to state legislation would not be in order where the state was relieving itself of its own obligation, and that the necessity and reasonableness of the repealing legislation should be examined. 431 U.S. at 25-26. Here the government has not bargained away one of its police powers but as was the case in *United States Trust Co.*, it has obligated itself to a financial contract with the Petitioners, who are Public Officers of the 36th District

Court. As in *United States Trust Co.*, alternative means were available to accomplish the aims of the Michigan Supreme Court; indeed, the Legislature had provided for attrition which would bring about the uniformity desired by the Court. The actions of the State were unreasonable, unnecessary, and therefore, unconstitutional. There has been no showing of a significant public purpose for the taking of the entirety of the contractual rights of Petitioners. And of course, there was no emergency or dramatically changed circumstance that might justify remedial action by the State.

United States Trust Co. suggests a heightened scrutiny when the "State's self-interest is at stake. 431 U.S. at 26. Even a minimal scrutiny here would reveal the absence of meaningful justification for the total repudiation of the State's obligation. When government seeks to alter or repudiate the substance of its own engagements, "[T]o say that [it] may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise . . . . This Court has given no sanction to such a conception of the obligations of our Government." *Nat. R. Pasngr. Corp.* v. *A.T&S.F.R.*, 470 U.S. 451, 470 (fn. 24) (1985) (citations omitted).

IV.

SUMMARY

The Petitioners urge this Court to hear this case not only with respect to the misuse of federal law as to collateral estoppel, but on the merits of their contentions as to the Takings Clause and the Contract Clause. Under ordinary circumstances, a finding in Petitioners' favor by this Court as to the estoppel issue might call for a remand to state courts on the substantive issues raised by Petitioners. But the State is a party defendant, and the Supreme Court of the State the central actor in the

State's taking. Such a remand will place Petitioners in a position, once again, where they will be unlikely to receive an untainted appraisal of the merits of their claims in State courts.

In the Michigan Court of Claims, a patently erroneous estoppel rationale was put forth by the Court, together with an egregiously absurd reading of a statute, designed to demonstrate that the Petitioners had no property at stake in the litigation. This absurdity was compounded by the fact that the Court, throughout much of its discussion relied, as did the United States District Court, on the wrong statute! This despite a Resolution of the Michigan House of Representatives, specifically reiterating the property bestowed upon Petitioners by the Legislature in the statute properly in question. (This absurd statutory misreading originated in the unnecessary portion of the opinion of the District Court for the Eastern District of Michigan, appearing subsequent to that portion of that opinion wherein the Court found itself without jurisdiction.)

The Michigan Court of Appeals adopted the estoppel rationale which is at issue in this Petition, and did not address any of the issues on the merits of Petitioners' claims. A remand to that Court would, in the most favorable circumstances, result in sending Petitioners back to the Court of Claims for a decision wholly on the merits, a decision already foreshadowed by that Court. The posture of the Court of Appeals in adopting the patent error of the lower court as to estoppel, and the refusal, twice, of the Michigan Supreme Court to hear Petitioners' case on any grounds, again suggest the futility of a return to the chain of State courts for hearings on the merits of Petitioners' claims.

The Petitioners strongly contend that the existence of a property right, subject to Takings and Contract Clause

analysis is manifest on the record as it presently appears before this Court, and need not be the cause of a remand to State courts. That being so, the questions of taking, contract and compensability *vel non* are properly before this Court, in an appropriate posture for decision by it. Were there to be a remand on those issues, given the indisputability of Petitioners' contention as to the existence of a property right, any final adverse holding by a Michigan court, (a likely occurrence in light of the conduct of those courts to the present), will result in the Petitioners returning to this Court on those constitutional issues.

The granting of a property right is manifest on the face of the statute, and its existence is endorsed in the Resolution of the House of Representatives. Given that, nothing is lost by a hearing, in this Court, of the remaining constitutional issues. The arguments for and against a taking rest on no interpretation of fact or of State law, and depend on this Court's constitutional interpretation of the Takings Clause. The same is true as to the issue of whether, if a taking is found, compensation is owing.

Petitioners are not unmindful of the great reluctance of this Court to anticipate rulings of state courts, particularly on matters of state law. Here, the state law question, the existence of the property right, cannot be gainsaid. Indeed, Petitioners contend that no reasonable person could read the grant by the Michigan Legislature to the Petitioners in a way other than that proffered by Petitioners: a life tenure position in the exclusive service of all process issued out of the 36th District Court, continuing at least 40 years of such a legislatively granted property right.

The State's position throughout the entirety of these proceedings to date has been that the Michigan

Supreme Court's authority in this area was absolute, and thus no legal harm was done to Petitioners. The Michigan Supreme Court itself did not respond favorably to requests from the Presiding Judge of the 36th District Court and the Chair of the Judiciary Committee of the House of Representatives and the Michigan Legislature to conform to MCL 600.8322, the statute on which Petitioners rely. Nothing in the State's posture or the Michigan Supreme Court's posture throughout this litigation suggests a change of position on remand. Given the clarity of the answer to the threshold question of the existence of property under State law, remand would only prove lengthy and costly to the Petitioners who have already spent much time and money in an effort to regain what is theirs.

The Petitioners have been caught in an internecine battle between two branches of State government. Recent taking and contract clause holdings in this court have made it clear that the most careful scrutiny will be imposed on state actions when the government has reneged on a promise — when, as here, "the state giveth, and the state taketh away — without compensation." *A fortiorari* should this be so when the giving is by one branch and the taking by another, with claimants in the middle. And, it must be noted, there is not the scintilla of a contention that the activities engaged in by the Petitioners were in any way contrary to the public good — at worst, they represented only a temporary lack of uniformity in one of Michigan's 98 District Courts.

Property rights established by state law, and protected by the United States Constitution, cannot be left to be vindicated as a side matter in a power struggle between branches of State government. This is particularly true where one of the branches engaged in the

struggle will have the decision-making power over claims made in reliance on the grant of property by the other branch. In these circumstances, Petitioners urge, it is entirely appropriate, indeed vital to the interests of fairness and justice, that this Court undertake to hear the case on the federal question of misuse of collateral estoppel under federal law, and on the constitutional questions of taking and impairment of contractual obligation.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. Given the clarity of the misapplication of federal procedural law, Petitioners believe that as to the collateral estoppel issue, summary reversal is warranted.

Respectfully submitted,

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Counsel for the Petitioners

**Counsel of Record*

APPENDIX TO PETITION FOR CERTIORARI

• • •

ORDER DENYING RECONSIDERATION OF ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered July 16, 1991)

(JOHN M. ABICK, et al., Plaintiffs-Appellants, v STATE OF MICHIGAN and STATE JUDICIARY COUNCIL, Defendants-Appellees – SC: 89709; COA: 109633; LC: 88-11677)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

On order of the Court, the motion for reconsideration of this Court's order of March 29, 1991 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

(*Certification Omitted*)

ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered March 29, 1991)

(JOHN M. ABICK, et al., Plaintiffs-Appellants, v STATE OF MICHIGAN and STATE JUDICIARY COUNCIL, Defendants-Appellees – SC: 89709; COA: 109633; LC: 88-11677)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(Certification Omitted)

OPINION

(State of Michigan — Court of Appeals)

(Filed June 8, 1990)

(JOHN M. ABICK, JAMES R. BRADLEY, JOHN B. CARRUTHERS, GERALD CLANCY, ISADORE COLES, RUTH COTTEN, LUCIUS C. DANIEL, JR., CHARLES W. DAVID, RAYMOND C. DERYCK, BRUCE GOLDSMITH, RICHARD A. HENTSCHEL, CALVIN C. HOPKINS, LLOYD JACKSON, RAYMOND KAY, JOHN J. KIRITSIS, EDWARD B. LEWAND, PHILLIP MULLEN, STEVE RADULOVICH, ELMER RASKIN, CLAY REEVES, FRANCIS D. RYAN, GEORGE L. VANANTWERP, JR., BERNARD VESSELS, RICHARD VIECELLI, JULIUS WATSON, and EDWARD WOJTOWICZ, Plaintiffs-Appellants, v STATE OF MICHIGAN and STATE JUDICIARY COUNCIL, Defendants-Appellees – No. 109633)

Before: Marilyn Kelly, P.J., and Gillis and MacKenzie, JJ.

PER CURIAM.

Plaintiffs are bailiffs of the 36th District Court who were formerly bailiffs of the Common Pleas Court of Detroit. Defendant Judiciary Council is plaintiffs' employer. In 1985, plaintiffs brought suit in federal district court against the instant defendants and the individual justices of the Michigan Supreme Court. *Abick* v *State of Michigan*, 607 F Supp 687 (ED Mich 1985). Plaintiffs contended that their legislative grant of position under MCL 600.8322; MSA 27A.8322 included the right to be the exclusive mechanism for service of process in the 36th District Court. Plaintiffs further contended that MCR 2.103, which essentially allows service of process by anyone of suitable age and discretion, deprived them of their property interest in being the exclusive process servers in the 36th District Court. Plaintiffs requested that the federal court declare MCR 2.103 unconstitutional and enjoin the defendants from enforcing it.

In *Abick*, the court concluded that the State of Michigan and the Judiciary Council were immune from suit in federal court under the Eleventh Amendment, and that the individual justices were cloaked with legislative immunity. 607 F Supp 690, 691. The court also found it necessary to resolve the merits of plaintiffs' claim that MCR 2.103 deprived them of a property right, since "the existence of this property interest is inextricably part of defendants' jurisdictional argument. . . ." 607 F Supp 692 n 4. The court then concluded that plaintiffs did not have an entitlement to serve process to the exclusion of all others, and therefore did not have a protected property interest of which they could be deprived. 607 F Supp 692-693. The 6th Circuit Court of Appeals affirmed. *Abick* v *State of Michigan*, 803 F2d 874 (CA6, 1986). The court agreed that all defendants were immune from suit and did not reach the issue of the existence of a property interest.

Plaintiffs filed the instant case in the Court of Claims on February 29, 1988 against the identical defendants. The basis of plaintiffs' claim was "a deprivation of a property right protected by the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States." This is identical to § 4 of plaintiffs' complaint in the federal court suit.

The trial court dismissed plaintiffs' action, finding that the claim against the justices was collaterally estopped. As for the claim against the instant defendants, the trial court found the federal district court's opinion had "some persuasive value" and granted summary disposition in favor of defendants.

We think that defendants are collaterally estopped from raising their deprivation of property interest claim against defendants. For collateral estoppel to apply, the same ultimate issues underlying the first action must be

involved in the second action. *Stolaruk Corp* v *Dep't of Transportation*, 114 Mich App 357, 362; 319 NW2d 581 (1982). The parties must also have had a full opportunity to litigate the ultimate issues in the former action. *Id.* Finally, collateral estoppel only applies where there is mutuality of estoppel. Mutuality of estoppel is present if both litigants in the second suit are bound by the judgment rendered in the first suit. *Id.*

In this case, there is no question that the same ultimate issues are involved in this case as in the federal case, i.e., whether plaintiffs had a property right, whether defendants would constitutionally deprive them of that right, and whether defendants were immune from suit. The mutuality of estoppel requirement is also clearly met; the original parties to this suit are identical to the parties in the federal suit.

For it to be said that a question has been actually litigated, it must have been put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined. *Sahn* v *Brisson*, 43 Mich App 666, 670; ___ NW2d ___ (1972). In this case, the question whether defendants had a property right was placed before the federal court and determined adversely to them by that court. Plaintiffs' contention, that the federal court's ruling on the property interest question was mere dicta, is not well taken in light of the court's statement that resolution of the question was required in order to decide if the State and the Judiciary Council were immune from suit. 607 F Supp 692, n 4. Plaintiffs' further argument, that the federal court's decision was ill-reasoned and unresponsive to their legal position, is also not well taken. Collateral estoppel does not depend upon whether justice was done in the first suit, but on whether the merits of the claim were considered and passed upon. *Stolaruk*, *supra*, p 363. In this case they were.

Because we have determined that plaintiffs were collaterally estopped from arguing in the Court of Claims that they were unconstitutionally deprived of a property right, we need not address the remaining issues raised on appeal.

Affirmed.

/s/ Marilyn Kelly
/s/ John H. Gillis
/s/ Barbara B. MacKenzie

ORDER AND JUDGMENT

(State of Michigan — Court of Claims)

(Filed June 1, 1988)

(John M. ABICK, et al, Plaintiffs, v. STATE OF MICHIGAN, Chief Justice Dorothy Comstock Riley, Justice Charles L. Levin, Justice James H. Brickley, Justice Michael F. Cavanaugh [*sic*], Justice Patricia J. Boyle, Justice Dennis W. Archer, Justice Robert P. Griffin, and the State Judiciary Council, jointly and severally, Defendants – CtCl No. 88-11677-NM)

At a session of the Court held at the City Hall, Lansing, Michigan on June 1, 1988.

HONORABLE MICHAEL G. HARRISON (P 14690),
JUDGE OF THE 30TH JUDICIAL CIRCUIT, PRESIDING.

For the reasons given orally from the bench on this date the defendants' motions are granted and the action is dismissed.

/s/ MICHAEL G. HARRISON
JUDGE OF THE 30TH JUDICIAL CIRCUIT

COUNTERSIGNED:
/s/ SHIRLEY A. RASMUSSEN
DEPUTY COURT OF CLAIMS CLERK

(*Certification Omitted*)

OPINION OF THE COURT OF CLAIMS

(9) THE COURT: All right. With respect to the naming of the justices individually, the Court is satisfied, first, as to property interest claim, that collateral estoppel does attach to this matter. As to breach of

contract claim, the court is satisfied that there was legislative immunity. The motion will be granted with respect to each of the individual justices. I do not take this to be an action against them in their individual capacity but as in their official capacity, and the Court's ruling is as to their official capacity. If they are being sued in their individual capacity, I don't think counsel clarified that, but I have not interpreted that this way. In any event, if it were in their individual capacities, the Court is satisfied that a cause of action has not been stated.

As to the State defendant, the Court is satisfied with respect to the property interest claim that Judge Feikens' opinion does have some persuasive value to it. The source of any claim here must derive only from the statute which has been promulgated and the former court rule. The statute explicitly authorizes the Supreme Court to adopt rules permitting any person to serve process, and the former DCR allowed any person of suitable age to serve process with leave of the Court. Therefore, the source of the alleged entitlement would (10) have to be the requirement that persons other than bailiffs could serve process only with leave of the court. This is the only relevant difference between the old rule and the new rule.

The Court is satisfied that it cannot be argued with validity that the requirement gave the plaintiffs an entitlement to serve process to the exclusion of all others. The "leave of the Court" argument merely empowered the Court to accommodate reasonably the interests of the party's litigation. Nor in the opinion of this Court was there any guarantee that others would not serve process. This matter was left to the discretion of the court. It clearly did not create, in this Court's opinion, any entitlement, as claimed by the plaintiffs, nor is there any language whatsoever in any document which

has been provided to this Court, the plaintiffs pointed to nothing which would intimate that this was a right which would exist forever. The State Constitution permits the Supreme Court to modify, amend, and simplify its rules as needed. The Court, therefore, will grant the motion for summary disposition with respect to the property interest claim.

With respect to the breach of contract claim, the Court is satisfied there is no contract of any guarantee beyond the statutory provision which sets a salary of $20,000 and a fixed amount for fees and mileage. The statute clearly states that the bailiffs covered under the provision shall not be entitled to any compensation from the State other than that specifically authorized by that statutory provision.

The fixed amounts under 8326, which makes reference to 2559, which sets the fee, the Court is of the opinion that there is no guarantee beyond that statutory provision as indicated. There is absolutely no guarantee, as previously indicated by this Court, of an amount of process a bailiff could or would be able to serve. The only possible source of the guarantee would be MCL 600.8321 and DCR 103. The statute, however, explicitly authorizes the Supreme Court, as previously indicated, to adopt the rules permitting any person to serve. There is nothing which gave any form of exclusive right to service of process or a total income.

The Court will grant the motion as filed for summary disposition.

* * *

OPINION

-REPORTED AT 803 F2d 874 (CA 6, 1986)-

(United States Court of Appeals — Sixth Circuit)

(Decided October 23, 1986)

(John M. ABICK; James R. Bradley; John B. Carruthers; Gerald Clancy; Isadore Coles; Ruth Cotten; Lucius C. Daniel, Jr.; Charles W. David; Raymond C. DeRyck; Bruce Goldsmith; Richard A. Hentschel; Calvin C. Hopkins; Lloyd Jackson; Raymond Kay; John J. Kiritsis; Edward B. Lewand; Phillip Mullen; Steven Radulovich; Elmer Raskin; Clay Reeves; Francis D. Ryan; George L. VanAntwerp, Jr.; Bernard Vessels; Richard Viecelli; Julius Watson; Edward Wojtowicz; Charlie Currie; Robert Eaton; Thornton Jackson; James Kinnard; Alfonso Newkirk; Robert Perry; Theodis Poole; Robert Ruhl; William Shuford; Raymond Sikora; Ernest Solomon and Jeramia Weatherly, Plaintiffs-Appellants, v. STATE OF MICHIGAN; Chief Justice G. Mennen Williams; Justice Dorothy Comstock Riley; Justice Charles L. Levin; Justice James L. Ryan; Justice James H. Brickley, Justice Michael F. Cavanagh; Justice Patricia J. Boyle; State Judiciary Council, jointly and severally, Defendants-Appellees – No. 85-1443)

Before: MERRITT and MARTIN, Circuit Judges, and BERTELSMAN,* District Judge.

BOYCE F. MARTIN, Jr., Circuit Judge.

The plaintiffs, bailiffs of the district court for the thirty-sixth judicial district of Michigan who in the past were servers of process for the district, claim that they have a property interest in their positions which was

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* **The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.**

taken without due process or just compensation. The bailiffs claim that the taking was caused by a new Michigan Supreme Court rule and brought this action against the State of Michigan, the State Judicial Council, and the individual justices of the Michigan Supreme Court. The bailiffs seek injunctive relief as well as damages.

The United States District Court held that Michigan and the State Judicial Council, technically the bailiffs' employer, were immune from suit under the eleventh amendment. The court held that the justices of the Michigan Supreme Court were protected by legislative immunity. 607 FSupp. 687, 689-91 (E.D. Mich. 1985). The United States District Court alternatively found that the bailiffs were not deprived of a constitutionally protected property interest. *Id.* at 691-93. We affirm because we hold that the defendants enjoy immunity from suit.

The essence of the bailiffs' claim is that by statute, they are the exclusive servers of process in the thirty-sixth district. They claim that they were guaranteed a lifetime tenure by M.C.L.A. § 600.8322(1) which states that a bailiff can retain his office "until death, retirement, resignation, or removal from office by the court for misfeasance or malfeasance in office." Their salary is § 20,000 plus fees or a pro rata share if they serve part-time. M.C.L.A. § 600.8322(6). The bailiffs claim that the exclusivity of serving process is acknowledged in a portion of M.C.L.A. § 600.8322(1) which provides that "[a]ll process issued by the district court in civil actions shall be rotated among the bailiffs pursuant to rules adopted by the court."

The general provision on service of process, M.C.L.A. § 600.8321(1) states that "[c]ivil process in the district court shall be served by a sheriff, deputy sheriff or a

court officer appointed by the judges of the court for such purpose." Section 600.8321(2) provides that "[u]nder the rules of the supreme court, any other person may serve any process or order of the district court which does not require the seizure, attachment or garnishment of property or the arrest of a person." The district court rule in effect before March, 1985, Rule 103, provided: "[p]rocess in civil actions may be served by any person under or pursuant to § 8321(1) of the Revised Judicature Act and by any other person of suitable age and discretion who is not a party nor an officer of a corporate party upon leave of court." The bailiffs claim that under the combination of statute and District Court Rule 103, persons other than bailiffs rarely served process.

District Court Rule 103 was replaced by Michigan Supreme Court Rule 2.103. Rule 2.103 provides for process to be served "by any legally competent adult who is not a party or an officer of a corporate party" except for service involving seizure, attachment, garnishment or arrest. The bailiffs claim that this change of the rule so that leave of court to serve process is no longer required has caused a taking of their job, a constitutionally protected property interest, because other persons now routinely serve process. They claim that service of process by bailiffs has diminished greatly.

As an initial matter, we must determine whether the defendants are immune from suit. The law is clear that Michigan and its agency, the State Judicial Council, under the eleventh amendment, are immune from an action for damages or injunctive relief in federal court. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 97-98, 104 S.Ct. 900, 906, 79 L.Ed.2d 67 (1984). However, the state can be sued if it consents to the suit and therefore waives its immunity. *Pennhurst*, 465 U.S. at 99, 104 S.Ct. at 907; *Alabama* v. *Pugh*, 438 U.S. 781, 782, 98

S.Ct. 3057, 57 L.Ed.2d 1114 (1978). Consent must be in the form of an "unequivocal indication," *Atascadero State Hospital* v. *Scanlon*, __ U.S. __, __, 105 S.Ct. 3142, 3145 n.1, 87 L.Ed.2d 171 (1985), and only where stated "'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman* v. *Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1360, 39 L.Ed. 662 (1974) (quoting *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909)).

The bailiffs argue that Michigan waived its immunity by enacting M.C.L.A. § 600.6419(1) and M.C.L.A. § 600.6440, two sections of the Court of Claims Act. Section 600.6419(1) states in pertinent part that "[e]xcept as provided in section 6440, the jurisdiction of the court of claims as conferred upon it by this chapter over claims and demands against the state or any of its departments, commissions, boards, institutions, arms or agencies shall be exclusive." Section 600.6440 provides in part that "[n]o claimant may be permitted to file claim in said court against the state or any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts." In *Copper Steamship Co.* v. *State of Michigan*, 194 F.2d 465, 468 (6th Cir. 1952), this Court specifically held that these two sections did not constitute a waiver of Michigan's eleventh amendment immunity. The bailiffs claim that this Court erred in interpreting the Michigan statutes. However, the Michigan Court of Appeals recently held that the Court of Claims Act does not waive Michigan's immunity from suit. *Lowery* v. *Department of Corrections*, 146 Mich. App. 342, 349, 380 N.W.2d 99 (1985) (citing *Brown Bros. Equipment Co.* v. *State of Michigan*, 266 F.Supp. 506, 507 (W.D. Mich. 1967)). *Accord Will* v. *Department of Civil Service*, 145 Mich. App 214, 220, 377 N.W.2d 826 (1985). We therefore see no reason to alter our holding in *Copper*

Steamship that the Court of Claims Act is not a waiver of immunity.

The bailiffs also argue that a waiver of immunity is found in the eminent domain provision of the Michigan Constitution which states that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Mich. Const. art. 10, § 2. This provision is not a waiver of immunity in this case because there has been no taking for public use. In addition, even if the provision could possibly be construed as a waiver, a conclusion we do not reach, the provision is certainly too ambiguous to satisfy the requirement that the provision be a clear statement of Michigan's "intention to subject itself to suit in *federal court*." *Atascadero*, ___ U.S. ___, 105 S.Ct. at 3147 (emphasis in original). Thus, Michigan is immune from suit.

The employer of the bailiffs, the State Judicial Council, as an arm and agent of the state, also enjoys eleventh amendment immunity. *Alabama* v. *Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). An exception to this rule has been created if the suit is one challenging the constitutionality of a state official's action. *Pennhurst*, 465 U.S. at 102, 104 S.Ct. at 909; *Ex Parte Young*, 209 U.S. 128, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Here, only the entity of the State Judicial Council was named as a defendant. No particular individual's conduct is challenged as unconstitutional so the exception cannot apply. The State Judicial Council shares Michigan's sovereign immunity provided by the Eleventh Amendment.

The final class of defendants, the justices of the Michigan Supreme Court, claim that they have legislative immunity for any suit relating to the promulgation of Michigan Supreme Court Rule 2.103. A provision such as Rule 2.103 relating to service of process is a rule of

practice and procedure. *See Chovin* v. *E. I. DuPont De Nemours & Co.*, 217 F.Supp. 808, 811 (E.D. Mich. 1963); *Daniels* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 163 Mich. 468, 473-74, 128 N.W. 797, 806 (1910); *Morrison* v. *Steiner*, 32 Ohio St. 2d 86, 89, 290 N.E.2d 841, 844 (1972). Article 6, Section 5 of the Michigan Constitution delegates the responsibility of promulgating court rules relating to practice and procedure to the Michigan Supreme Court. If the Michigan Supreme Court promulgates a rule which conflicts with a statute, the rule is followed. *Buscaino* v. *Rhodes*, 385 Mich. 474, 479-80, 189 N.W.2d 202, 204-06 (1971); *Perin* v. *Peuler*, 373 Mich. 531, 541, 130 N.W.2d 4, 10 (1964). The Michigan Supreme Court's promulgation of rules of practice and procedure is a legislative activity. *See Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); *Hirschkop* v. *Snead*, 646 F.2d 149, 151 (4th Cir. 1981); *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971). In *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), the Court held that the justices of the Virginia Supreme Court enjoyed legislative immunity for a claim based on the promulgation of a set of rules to govern the Virginia Bar. The Supreme Court held that when promulgating these rules, the justices of the Virginia Supreme Court were acting in a legislative capacity and in fact were "the State's legislators." *Id.* at 734, 100 S.Ct. at 1975. As such, the justices were entitled to legislative immunity. *Id.* Similarly, the justices of the Michigan Supreme Court were acting in their legislative capacity and therefore are entitled to legislative immunity.

Having determined that all the defendants are immune from suit, we need not reach the issue of the existence of a property interest.

We affirm.

OPINION

–REPORTED AT 607 F. SUPP. 687 (D.C. MICH. 1985)–

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Decided April 30, 1985)

(John M. ABICK, James R. Bradley, John B. Carruthers, Gerald Clancy, Isadore Coles, Ruth Cotten, Lucius C. Daniel, Jr., Charles W. David, Raymond C. DeRyck, Bruce Goldsmith, Richard A. Hentschel, Calvin C. Hopkins, Lloyd Jackson, Raymond Kay, John J. Kiritsis, Edward B. Lewand, Phillip Mullen, Steven Radulovich, Elmer Raskin, Clay Reeves, Francis D. Ryan, George L. VanAntwerp, Jr., Bernard Vessels, Richard Viecelli, Julius Watson, Edward Wojtowicz, Charlie Currie, Robert Eston, Thornton Jackson, James Kinnard, Alfonso Newkirk, Robert Perry, Theodis Poole, Robert Ruhl, William Shuford, Raymond Sikora, Ernest Solomon, and Jeramia Weatherly, Plaintiffs, v. STATE OF MICHIGAN, Chief Justice G. Mennen Williams, Justice Dorothy Comstock Riley, Justice Charles L. Levin, Justice James L. Ryan, Justice James H. Brickley, Justice Michael F. Cavanagh, Justice Patricia J. Boyle, and State Judiciary Council, jointly and severally, Defendants – No. 85-CV-70470-DT)

FEIKENS, Chief Judge.

This action is brought by certain bailiffs ("plaintiffs") for the State of Michigan who allege that the new Michigan Court Rules violate their constitutional rights. Specifically, they claim that by authorizing persons other than bailiffs to serve process, the Rules deprive plaintiffs of a property interest without due process of law or just compensation. I conclude that defendants are immune from suit by virtue of the Eleventh Amend-

ment and legislative immunity, and that plaintiffs were not deprived of a proteced property interest. Accordingly, defendants' motion to dismiss is granted.

I.
FACTS

The facts can be stated succinctly. Plaintiffs are bailiffs of the District Court for the 36th Judicial District for the State of Michigan. M.C.L.A. § 600.8322(1) provides that "[a] bailiff shall hold office until death, retirement, resignation, or removal from office by the court for misfeasance or malfeasance in office."

Plaintiffs' compensation is governed by M.C.L.A. § 600.8322(6), which specifies that full-time bailiffs shall receive an annual salary of $20,000, and part-time bailiffs shall receive a pro rata portion of this amount "based on that portion of a full-time bailiff's workload to be assigned to the bailiff." This salary is supplemented by fees that bailiffs charge for serving process. M.C.L.A. § 600.8322(6). Plaintiffs allege that this fee for service "resulted in an average payment in 1980 of $39,000 to each Bailiff as well as a contribution to a pension plan." Plaintiffs' Motion for a Preliminary Injunction, p. 2.

The dispute in this case centers on who is authorized to serve process. M.C.L.A. § 600.8321(1) provides that "[c]ivil process in the district court shall be served by a sheriff, deputy sheriff or a court officer appointed by the judges of the court for such purpose . . . ." Subsection two adds that "[u]nder rules of the supreme court, any other person may serve any process or order of the district court which does not require the seizure, attachment or garnishment of property or the arrest of a person." M.C.L.A. § 600.8321(2). This statutory grant of authority to the Court to issue rules supplements the power conferred by Article 6, Section 5, of the Michigan

Constitution: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

Prior to March 1, 1985, a Michigan District Court Rule, D.C.R. 103, specified that with the exception of service requiring seizure, attachment or garnishment of property, or arrest, "[p]rocess in civil actions may be served by any person under or pursuant to § 8321(1) of the Revised Judicature Act and by any other person of suitable age and discretion who is not a party nor an officer of a corporate party upon leave of court." This rule was superseded by the new Michigan Court Rules, which were promulgated by the Michigan Supreme Court and became effective on March 1, 1985. Rule 2.103 allows process in civil actions to be served "by any legally competent adult who is not a party or an officer of a corporate party" (again, with the exception of service involving seizure, attachment, garnishment or arrest). The only difference in this new rule that is relevant to this dispute is that *leave of court* is no longer required before legally competent adults can serve process.

Plaintiffs argue that this change has caused them great hardship. They allege that under D.C.R. 103, persons other than bailiffs were rarely authorized by courts to serve process. They further allege that because leave of court is no longer required, such persons now routinely serve process. According to plaintiffs, service of process by bailiffs has diminished over 95% and, presumably, there has been a corresponding decline in the fee-for-service portion of their compensation. I must assume that these allegations are true for purposes of this motion.

In this action, plaintiffs sue the State of Michigan, the State Judiciary Council and the individual Justices of the Michigan Supreme Court. Plaintiffs contend that

they have a constitutionally protected property interest in serving process exclusively, and that by expanding the class of persons authorized to serve process the new rules deprive them of this property interest. Plaintiffs ask that Rule 2.103 be declared unconstitutional and that defendants be enjoined from enforcing it.

II.
DISCUSSION

A. *Eleventh Amendment Immunity of the State and State Judiciary Council*

It is well established that the Eleventh Amendment immunizes the State and its agencies from a suit for declaratory or injunctive relief unless the State "has consented to the filing of such a suit." *Alabama* v. *Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978). Plaintiffs accept this as the general rule, but argue that the State has consented to this suit. Plaintiffs wear a heavy burden in advancing this claim, for waiver of Eleventh Amendment immunity will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman* v. *Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974) (quoting *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909)).

Plaintiffs suggest that the State's consent to suit in federal court may be found in M.C.L.A. §§ 600.6419(1), 600.6440. Section 600.6419(1) states that "[e]xcept as provided in section 6440, the jurisdiction of the court of claims as conferred upon it by this chapter over claims and demands against the state or any of its departments, commissions, boards, institutions, arms or agencies shall be exclusive . . . ." Section 600.6440 provides

that "[n]o claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts . . . ."

The very argument now advanced by plaintiffs was considered and rejected by the United States Court of Appeals for the Sixth Circuit in *Copper S.S. Co.* v. *State of Michigan*, 194 F.2d 465 (6th Cir. 1952). The Court held that "there was no intention in creating the Court of Claims to enlarge or extend the existing jurisdiction of the federal courts over the State or any of its departments, commissions or agencies." 194 F.2d at 468.

Plaintiffs assert that the decision in *Oliver* v *Kalamazoo Board of Education*, 73 F.R.D. 30 (W.D. Mich. 1976), *rev'd on other grounds*, 576 F.2d 714 (6th Cir. 1978), supports their position. While the Court in *Oliver* did find a waiver of sovereign immunity, that waiver was inferred from M.C.L.A. § 388.1007, which explicitly authorized suits against the State Board of Education. The Court did *not* hold that M.C.L.A. § 600.6440 waived the State's sovereign immunity; it merely indicated that this statute did not conflict with the explicit waiver in M.C.L.A. § 388.1007. In light of the Court's conclusion that M.C.L.A. § 600.6440 was "totally irrelevant" to the suit before it, 73 F.R.D. at 36, the *Oliver* case obviously does not support plaintiffs' contention.

Alternatively, plaintiffs argue that waiver may be found in State constitutional and statutory provisions authorizing courts to determine just compensation when private property is taken for a public use. MICH. Const. Art. 10 § 2; M.C.L.A. §§ 213.51-213.75. At most, these provisions might waive immunity in suits in which there is a property interest and that interest is converted to a public use — conditions that are not pre-

sent here.[1] Furthermore, the ambiguity of the State's "consent" is increased by the fact that the provisions relied on by plaintiffs do not expressly authorize *federal* court actions.

In sum, I cannot find in these provisions the "express language" or "overwhelming implication" that *Edelman* indicates are prerequisites to a State's waiver of Eleventh Amendment immunity. I therefore conclude that the State of Michigan and the State Judiciary Council are protected from suit by their sovereign immunity and the claims against them must be dismissed.

B. *Legislative Immunity of the Individual Justices*

Defendants argue that the remaining defendants, the individual Supreme Court Justices, are protected from suit by legislative immunity. A similar claim was considered in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), where a plaintiff attempted to enjoin Virginia Supreme Court Justices from enforcing a disciplinary rule against attorney advertising. The United States Supreme Court held that because the Justices claimed inherent power to regulate the Bar and were "exercising the State's entire legislative power with respect to regulating the Bar, . . . its members are the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity." 446 U.S. at 734, 100 S.Ct. at 1976. More specifically, the Court indicated that "[i]f the sole basis for [plaintiffs'] § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against [the defendants]." 446 U.S. at 734, 100 S.Ct. at 1976.

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[1] **The reasons that plaintiffs do not have a cognizable "property interest" are explained *infra*.**

The Court went on to find, however, that the Justices were liable insofar as they were acting in their enforcement capacity, and left open the question of whether they could be sued for acts in their judicial capacity. The Court observed that the Justices had inherent authority to enforce the disciplinary rules as well as statutory authority to discipline, suspend and disbar attorneys. 446 U.S. at 737, 100 S.Ct. at 1977. Based on this enforcement authority, the Court concluded that "the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." 446 U.S. at 736, 100 S.Ct. at 1977 (footnote omitted).

It is evident that in promulgating the rule in dispute here the Justices were acting in a legislative capacity. The Justices acted pursuant to their inherent authority to supervise the courts and the State Constitution's delegation of authority to enact rules governing practice and procedure. Hence, as in *Consumer's Union*, the Justices "are the State's legislators" for purposes of adopting these rules. 446 U.S. at 734, 100 S.Ct. at 1976. *Consumers Union* clearly teaches that legislative immunity forecloses suit against the Justices for "the issuance of, or failure to amend, the challenged rules." 446 U.S. at 734, 100 S.Ct. at 1976.

Plaintiffs seek to avoid this bar by arguing that the Justices may be sued in their enforcement capacity. The plaintiffs have not, however, pointed to any acts of enforcement that the Justices have undertaken or may undertake at any time in the future. On the contrary, the rule at issue is permissive, not proscriptive; no enforcement is necessary for it to be effectuated. The only action required of the Justices was the formulation

and issuance of the rule, and *Consumers Union* holds that this action is protected by legislative immunity.[2]

I conclude that plaintiffs have failed to allege any conduct by the individual defendants that would not fall within the cloak of legislative immunity. Accordingly, the claims against these defendants must also be dismissed.

C. *Plaintiffs' Alleged "Property Interest"*

I turn finally to plaintiffs' claim that they have a protected property interest. Ordinarily I would not address this question, having already decided that the case must be dismissed on jurisdictional grounds. In this case, however, I am loath to dismiss this federal constitutional claim solely on the basis of what one might argue are close jurisdictional questions. To do so would force plaintiffs to seek judicial relief in the state courts, where their rights would be determined by the Michigan Supreme Court, a defendant in this action.[3] From a pragmatic point of view, the layman may be at a loss to understand the fairness of such a result. Consequently, in the unusual circumstances of this case,

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[2] This Court has repeatedly indicated its concern to plaintiffs that they were not suing the proper defendants. On March 11, 1985 plaintiffs were given leave to amend their complaint, but they failed to add any new defendants. Subsequently, the Court specifically asked the parties to submit briefs indicating whether the individual defendants have any enforcement powers that may be enjoined. Nevertheless, plaintiffs have neither added defendants who are more directly involved in the execution of the rule, nor indicated what specific enforcement powers the Justices possess that are relevant to Rule 2.103 and may be exercised.

[3] In an earlier proceeding, I indicated my intention to abstain in this case, so that the issue of whether plaintiffs had a property interest under state law could be certified to the Michigan Supreme Court. I subsequently decided that this would be inappropriate for the pragmatic reason indicated in text, and also because resolution of the jurisdictional issues was required before a decision could be made on abstention.

I think it is necessary to discuss the merits of plaintiffs' claims.[4]

The starting point in determining whether plaintiffs have a protected property interest is the analytical framework explained in *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). In *Roth*, the Supreme Court indicated that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In this case, plaintiffs are not simply arguing that they have a property interest in their jobs as bailiffs, for no plaintiff has been discharged from this position. Instead, plaintiffs claim that by permitting other persons to serve process, the State effectively caused a substantial diminution in plaintiffs' position. Hence, the essence of plaintiffs' claim is that their property interest includes the right to serve process exclusively.

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[4] **There are additional reasons why consideration of plaintiffs' alleged property interest is warranted. First, the existence of this property interest is inextricably part of defendants' jurisdictional argument, *see* note 1 *supra*, and thus its resolution is required. Second, plaintiffs' claim to a property interest is arguably so insubstantial that it should be addressed as an independent jurisdictional basis for dismissal. *See Bell* v. *Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776-77, 90 L.Ed. 939 (1946).**

In predicating their case on such a claim, plaintiffs grasp at the thinnest of threads. Plaintiffs suggest that the sources of this right are M.C.L.A. § 600.8321 and D.C.R. 103, which preceded the new rule. The statute, however, explicitly authorizes the Supreme Court to adopt rules permitting any person to serve process, and D.C.R. 103 allowed any person of suitable age to serve process with leave of court.[5] Hence, if the entitlement asserted by plaintiffs is to be found, its source must be the requirement that persons other than bailiffs could serve process only with *leave of court*: this requirement is the only relevant difference between the old rule and the new rule.

It cannot seriously be thought that such a requirement gave plaintiffs an entitlement to serve process to the exclusion of all others. The "leave of court" requirement simply empowered a court to accommodate reasonably the interests of the parties to litigation as well as the judiciary's interests; there is no indication that it was intended for plaintiffs' benefit. *See Ash* v. *Board of Education*, 699 F.2d 822, 826 (6th Cir. 1983). Nor did it constitute any sort of guarantee that others would not serve process; this decision was left to the discretion of the Court. In short, it clearly did not create the entitlement claimed by plaintiffs.[6]

[5] There are some additional limitations, but they are not relevant to this dispute.

[6] Plaintiffs also suggest two other sources of the entitlement they claim. First, they point to M.C.L.A. §600.8322(1), which provides that "[a]ll process issued by the district court in civil actions shall be rotated among the bailiffs pursuant to rules adopted by the court." It is apparent that the language "all process" in this provision refers to all process *that is served by bailiffs*, for §600.8321(2) expressly permits some process to be served by persons other than bailiffs. This conclusion is dictated by the cardinal rule of statutory construction that "[d]ifferent portions of the same statute should

(*concluded on page A-26*)

In support of this conclusion it should be added that even if the rules had only authorized plaintiffs to serve process, plaintiffs can point to no language even hinting that this was a right that would exist in perpetuity. On the contrary, the State Constitution permits the Supreme Court to modify, amend and simplify these rules as needed. *See Ash*, 699 F.2d at 826 (holding that statutory requirement that wages be specified in contract did "not contain any restrictions on the Board's right to adopt an amended school calendar with an attendant reduction in the teachers' salaries due to their participation in an illegal strike," and therefore did "not provide the plaintiffs with a protected property interest").

The Court is aware that the change in the court rules may cause a substantial hardship to plaintiffs and result in disappointed expectations. This, unfortunately, will often be the case when the legislature or the courts modify rules or regulations in a manner that diminishes, or even eliminates, the responsibilities of some individuals. But such individuals cannot find relief in ambiguous, discretionary, or impermanent statutory authorizations that do not remotely purport to create an entitlement. Instead, they must seek relief from the Legislature, or perhaps in this case the Michigan Supreme Court. To reiterate the teachings of *Roth*: "To

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(*continued from page A-25*)

be read and interpreted consistently with each other, avoiding conflicts." *United States* v. *Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982); *aff'd*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984).

Plaintiffs have also made passing reference to their "understanding." However, plaintiffs point to no promises, representations or other facts that might support such an understanding. It is clear that a unilateral expectation is insufficient, and plaintiffs have made no specific allegations that would permit this Court to infer anything more than this.

have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. No such entitlement can be found in this case. The absence of a protected property interest independently warrants the dismissal of plaintiffs' complaint.

III.
CONCLUSION

Defendants' motion to dismiss is granted. An appropriate order may be submitted.

LETTER FROM REP. BULLARD TO JUDGE FEIKENS

(Dated February 28, 1985)

PERRY BULLARD
MICHIGAN STATE REPRESENTATIVE
HOUSE OF REPRESENTATIVES
STATE CAPITOL BUILDING
LANSING, MICHIGAN 48909

CHAIR, JUDICIARY COMMITTEE
COMMITTEE MEMBER
OF: TAXATION

The Honorable John Feikins [*sic*]
Chief Judge, U.S. District Court, Eastern District
Courthouse, Lafayette Blvd., Detroit, MI 48226

Re: 85 CV 70470 DT *ABICK, et al.* v *State of Michigan, et al.*

Dear Judge Feikins: February 28, 1985

The above-referenced civil action has come to the attention of the House Judiciary Committee through Representative Raymond Murphy (District 17, Detroit). The conflict between MCLA 600.8322(1) and recently adopted Michigan Court Rule 2.103A is apparent and admits of no easy resolution. The Judiciary Committee is currently considering adoption of a House Resolution urging the Michigan Supreme Court to amend sections of the Michigan Court Rules to comport with the District Court Act.

In the interim, we have been advised by Special Counsel to the Judiciary Committee, Marcel Greenia, of a certification procedure under GCR 797.2 (new rule MCR 7.305[B]). We would request your consideration of said procedure. If there is any "briefing" or other assistance which Mr. Greenia can render, please feel welcome to contact him (517/373-3736).

Thank you for your consideration and attention to this matter.

Sincerely,
PERRY BULLARD, Chair, House Judiciary Committee

PB:msg:ljk
cc: Committee, Rep. Murphy, Marcel Greenia

EXCERPTS FROM THE JOURNAL
OF THE MICHIGAN HOUSE OF REPRESENTATIVES

No. 121 – JOURNAL OF THE HOUSE OF REPRESENTATIVES
83rd Legislature – Regular Session of 1985

2556 STATE OF MICHIGAN [December 10, 1985]

Reps. Perry Bullard, Murphy and DeMars offered the following resolution:

House Resolution No. 371.

A resolution requesting that the Michigan Supreme Court amend Rule 2.103 of the Michigan Court Rules of 1985 concerning the serving of civil process.

Whereas, Section 8322 of the Revised Judicature Act of 1961 (1961 PA 236, as amended) has reserved for the bailiffs of the Thirty-sixth District Court certain duties and rights regarding the serving of civil process in civil action cases before that court. This statute has vested special functions, compensation, and tenure rights for those bailiffs of the former Common Pleas Court of Detroit who, under section 8322, became bailiffs of the Thirty-sixth District Court; and

Whereas, In adopting Rule 2.103 of the Michigan Court Rules of 1985, the Michigan Supreme Court has expanded the class of persons who can serve process in the Thirty-sixth District Court. This new rule allows the service of process in civil actions by ". . . any legally competent adult who is not a party or an officer of a corporate party." Thus, the bailiffs of this court have been denied the exclusive rights granted to them by the Michigan Legislature regarding the serving of civil process; and

Whereas, The action of the Michigan Supreme Court in the adoption of Rule 2.103 has created an obvious conflict as to the Court's authority to change the intent

or effect of a constitutionally enacted law of the Michigan Legislature, It seems clear that it is necessary for the Michigan Supreme Court to amend Rule 2.103 so that it is consistent with section 8322 of the Revised Judicature Act of 1961: now, therefore, be it

Resolved by the House of Representatives, That the members of this legislative body hereby request the Michigan Supreme Court to amend Rule 2.103 of the Michigan Court Rules of 1985 so that it is in keeping with the intent and purpose of section 8322 of the Revised Judicature Act of 1961; and be it further

Resolved, That a copy of this resolution be transmitted to the Michigan Supreme Court.

The resolution was referred to the Committee on Judiciary.

No. 25 – JOURNAL OF THE HOUSE OF REPRESENTATIVES
83rd Legislature – Regular Session of 1986

400 STATE OF MICHIGAN [March 3, 1986]

The Speaker laid before the House

House Resolution No. 371.

A resolution requesting that the Michigan Supreme Court amend Rule 2.103 of the *Michigan Court Rules of 1985* concerning the serving of civil process.

(For text of resolution, see p. 2556 of House Journal No. 121 of 1985.)

(The resolution was reported by the Committee on Judiciary on February 27, consideration of which was postponed until today under the rules.)

The question being on the adoption of the resolution,

The resolution was adopted.

LETTER FROM JUDGE DOSS TO MICHIGAN SUPREME COURT CLERK DAVIS

(Dated October 5, 1984)

36TH DISTRICT COURT
600 RANDOLPH STREET
DETROIT, MICHIGAN 48226

THERESA DOSS, Chief Judge

Mr. Corbin Davis, Clerk
Supreme Court of Michigan
State Court Administrative Office
P.O. Box 30048, Lansing, Michigan 48909

Dear Mr. Davis: October 5, 1984

After review of the Michigan Court Rules of 1985, it appears that a few of them will have an adverse impact on the operation of the 36th District Court. Therefore, we are submitting some proposed local court rules and the rationale for each.

We respectfully recommend their adoption.

Very truly yours,
/s/ Theresa Doss
Chief Judge, 36th District Court

TD:djm
Enclosures

cc: State Court Administrator

PROPOSED LOCAL COURT RULES
FOR THE 36TH DISTRICT COURT

LCR2.103(A) BAILIFF AND COURT OFFICERS

.1 Process issued on civil actions in the 36th District Court shall be served by bailiffs or court officers in accordance with MCL600.8322.

2. The chief judge may authorize the clerk to rotate without discrimination all process except writs of execution, attachment, and claim and delivery among all duly qualified bailiffs and court officers who are actively engaged in the serving of process and who have filed written notice with the clerk of their willingness to serve process. The chief judge may specifically direct exceptions to the assignment system.

   All summary proceedings shall be rotated among the bailiffs pursuant to rules adopted by the Court except that a writ of restitution shall be issued to the bailiff to whom the summons was issued in the particular proceeding.

* * *

RATIONALE FOR LCR2.103(A)

This rule is consistent with the intent of the Court Reorganization Legislation of 1980 and is required in order to implement the mandates of MCL600.8322.

MCL 600.8322

Bailiffs; former common pleas court bailiffs, serving process, bond, term, vacancies, compensation, records, audit, appointment, retirement fund

Sec. 8322. (1) A person serving as a bailiff to the common pleas court of Detroit on August 31, 1981, pursuant to an appointment under section 23 of former Act No. 260 of the Public Acts of 1929,[1] shall become a bailiff of the district court in the thirty-sixth district on September 1, 1981. A bailiff shall be considered a court officer under section 8321(1)[2] for the exclusive purpose of serving civil process in a civil action commenced in the district court in the thirty-sixth district, except for process issued in a summary proceeding under chapter 57.[3] All process issued by the district court in civil actions shall be rotated among the bailiffs pursuant to rules adopted by the court. A bailiff shall file with the clerk of the court a surety bond in the amount of $100,000.00 with a surety company. The premium on the surety bond shall be paid by the district control unit. A bailiff shall possess only the powers necessary to serve process issued by the court. A bailiff governed pursuant to this subsection may bear arms while in office and in the exercise of his or her duties as bailiff. A bailiff shall hold office until death, retirement, resignation, or removal from office by the court for misfeasance or malfeasance in office. A vacancy in the office of bailiff as established pursuant to this subsection shall not be filled.

[1] [*Printer's Note*]: **Footnotes omitted in this reproduction.**

(2) A person serving as a bailiff of the common pleas court on August 31, 1981, pursuant to an appointment under section 31 of former Act No. 260 of the Public Acts of 1929, shall become a bailiff of the district court in the thirty-sixth district on September 1, 1981. A bailiff shall be considered a court officer under section 8321(1) for the exclusive purpose of serving civil process in summary proceedings commenced under chapter 57 in the district court in the thirty-sixth district. All process issued by the district court in summary proceedings shall be rotated among the bailiffs pursuant to rules adopted by the court, except that a writ of restitution shall be issued to the bailiff to whom the summons was issued in the particular proceeding. A bailiff shall file with the clerk of the court a surety bond in an amount of $100,000.00 with a surety company. The premium on the surety bond shall be paid by the district control unit. A bailiff governed pursuant to this subsection shall be considered a peace officer only for the purpose of receiving compensation provided by Act No. 329 of the Public Acts of 1937, as amended, being sections 419.101 to 419.104 of the Michigan Compiled Laws. A bailiff shall hold office until death, retirment, resignation, or removal from office by the court for misfeasance or malfeasance in office. A vacancy in the office of bailiff established pursuant to this subsection shall not be filled.

* * *

(4) Upon the existence of a vacancy in the office of bailiff established under this section, the chief judge of the district may appoint a court officer pursuant to section 8321(1).

(5) A court officer appointed pursuant to subsection (4) to serve civil process in the thirty-sixth district

shall be an employee of the state judicial council. The compensation of a court officer shall be paid by the state and shall be fixed as provided in sections 592 and 9104.[4] Fees prescribed in section 8326,[5] except mileage, shall be payable to the district control unit and shall not be payable to a court officer appointed under this subsection. A court officer shall be entitled to mileage pursuant to section 8326.

* * *

MCL 600.8321

Service of process, limitations

Sec. 8321. (1) Civil process in the district court shall be served by a sheriff, deputy sheriff or a court officer appointed by the judges of the court for such purpose, except that officers of the department of state police may serve civil process in any action to which the state is a party and police officers of an incorporated city or village may serve civil process in any action to which the incorporated city or village is a party.

(2) Under rules of the supreme court, any other person may serve any process or order of the district court which does not require the seizure, attachment or garnishment of property or the arrest of a person. This section shall apply notwithstanding the provisions of section 1908.[1]

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[1] **Section 600.1908.**

P.A. 1980, No. 87

AN ACT to provide procedures for the condemnation, acquisition, or exercise of eminent domain of real or personal property by public agencies or private agencies; to provide for damages; to prescribe remedies; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

[*MCLA*] 213.51. Definitions

Sec. 1. As used in this act:

* * *

(h) "Property" means land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights whether real, personal, or mixed including fluid mineral and gas rights.

* * *

EXCERPT FROM RESPONDENTS' BRIEF ON APPEAL

(State of Michigan — Court of Appeals)

(October 14, 1988)

* * *

V.

PLAINTIFFS-APPELLANTS BAILIFFS DO NOT HAVE A PROPERTY RIGHT TO THE EXCLUSIVE SERVICE OF PROCESS.

Rather than beginning with a partisan argument on this issue, the state presents the non-partisan opinion by federal District Judge Feikens of the Eastern District of Michigan, taken from his opinion in 607 FSupp at 691-693 of April 30, 1985 (exh A-5 to A-7), that was handed down after the same plaintiffs (appellants here) and the same defendants (appellee here) had presented their written and oral arguments to him, based on the federal Complaint (exh C) that was the same as the Complaint in this case in Michigan's Court of Claims. This opinion is not the basis for collateral estoppel because the federal District Court did not have jurisdiction of that part of the Bailiffs' Complaint against the State. The opinion is, however, very persuasive.

* * *